JAN 3 2001

No. 99-2047

JAN 8 2001

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the Supreme Court of Rhode Island properly dismissed petitioner's regulatory takings claim as unripe.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a substantial interest in legal issues that affect state and local governments.[1] Land use regulation is one of *amici*'s most important functions. *Amici* therefore have a manifest interest in this regulatory takings case.

The threshold question—whether petitioner's regulatory takings claim is ripe—is of particular importance to *amici* and their members. Petitioner asks for this Court to federalize the law of ripeness applicable to regulatory takings claims brought in the state courts. This would be an especially unwarranted result because this Court does not possess supervisory powers over the state courts. Moreover, as the text of the Fifth Amendment makes clear, a regulatory takings claim does not become a federal claim at all until a property owner has sought and been denied just compensation in the State's courts. Until a property owner exhausts the State's remedy for obtaining just compensation, the claim is governed by state law. Absent a showing—which has not been made here—that a State's ripeness rule violates the Due Process Clause, there is no basis for this Court to overturn the Supreme Court of Rhode Island's ripeness determination.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have issued is a blanket consent to the filing of briefs *amicus curiae*, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. A state court adjudicating a regulatory takings claim is not bound by the prudential ripeness principles that govern Fifth Amendment takings claims in the federal courts. While state courts can look to these principles for guidance, state courts are free to establish state ripeness rules so long as those rules do not violate the due process clause of the Fourteenth Amendment.

This conclusion is compelled for two reasons. The first is that this Court does not possess supervisory powers over the jurisdiction of the state courts. The second is that where a State provides a remedy for obtaining compensation for a regulatory taking, the claim is governed by state law until the property owner has exhausted the State's remedies and been denied just compensation. Until the property owner exhausts the State's remedies, the property owner has no federal claim and the federal ripeness principles applicable to Fifth Amendment takings claims do not control. The Rhode Island Supreme Court could therefore validly hold, as a matter of state law, that petitioner was required to submit "additional applications" for less ambitious development.

While the Rhode Island Supreme Court did not cite authority for its ripeness determination, a rule of the State's Coastal Resources Management Council authorized the granting of a variance from the Council's standards. Petitioner, however, did not use the variance procedure. Furthermore, a state court has authority to fashion the State's ripeness rules to

protect the integrity of the administrative scheme applicable to petitioner's property. Petitioner did not comply with the Coastal Council's rules that required him to obtain various permits before applying for permission to develop the property. The Rhode Island Supreme Court could have validly insisted on compliance with the Council's rules as a condition precedent to judicial review. Petitioner's contention that his suit is ripe notwithstanding his failure to comply with the Council's rules is simply an attempt to short-circuit the review process and shift the burden of proof as to compliance from himself to the State.

2. When reviewed under federal ripeness principles, petitioner's claim is likewise not ripe. This Court's cases require a determination of the level of development permitted by regulatory authorities before addressing whether a taking has occurred. Thus, the Court has required that a property owner obtain a "final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). This final decision rule requires that a property owner exhaust available administrative remedies—including procedures for obtaining a variance—before bringing a takings claim. This rule "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 734 (1997) (citation omitted).

Of petitioner's two applications to fill the wetlands, only the beachclub application proposed any type of development. Although petitioner sought a special exception for both applications, he has never utilized the Council's variance procedure. Thus, while this

dispute centers on approximately eighteen acres of wetlands, the precise size of the property—which clearly includes several upland areas—is unknown. Notwithstanding petitioner's assertions to the contrary, the Council has never determined the scope of permissible development on these upland areas and a court cannot determine whether petitioner has been denied all economically viable use of his property.

Furthermore, petitioner's failure to obtain the permits which are prerequisites under the Council's rules compels this Court to speculate as to the suitability of the property for development. Because petitioner's claim rests on contingent future events that include regulatory approvals by federal, state and local agencies, no court can fairly determine the economic impact of the Council's action and the extent to which it interferes with petitioner's reasonable investment-backed expectations. A court thus cannot decide either whether a taking has occurred or the property's fair market value.

Finally, the Court should dismiss petitioner's claim as unripe because there is substantial uncertainty as to whether petitioner even owns the wetlands that the State allegedly has "taken" from him. Rhode Island follows the common law rule that the State has title to lands that are below the mean high water mark. The Rhode Island Supreme Court's decision (Pet. App. 3a) and the 1980 assessor's plat (Joint Lodging No.2, Defendant's Ex. AA) suggest that a substantial amount of the property is below the mean high-water mark and thus belongs to the State, not to petitioner. This Court cannot answer the question of whether petitioner has been denied economically

viable use of property without knowing how much property he owns.

ARGUMENT

I. THE SUPREME COURT OF RHODE ISLAND PROPERLY DISMISSED PETITIONER'S REGULATORY TAKINGS CLAIM AS NOT RIPE UNDER STATE LAW

The Supreme Court of Rhode Island correctly held that petitioner's regulatory takings claim was not ripe for review notwithstanding the CRMC's denial of his two applications. Petitioner takes issue with the Rhode Island Supreme Court's holding that his claim was not ripe because he was required to submit "additional applications" seeking "permission for less ambitious development plans." Pet. App. 11a & 12a n.6; *see also* Pet. Br. 14-20. While petitioner asserts that the Rhode Island Supreme Court "failed to understand that Mr. Palazzolo has satisfied all of this Court's ripeness requirements for regulatory takings claims," Pet. Br. 10-11, petitioner misapprehends ripeness doctrine and the Fifth Amendment's takings clause.

As explained below, this Court has limited authority to review the ripeness doctrine which a state court applies to cases before it. While the Rhode Island courts can seek guidance from this Court's general ripeness jurisprudence and the prudential rules applicable to takings claims brought in the federal courts, these rules are not binding on the State's courts. Because a Fifth Amendment takings claim against a state or local government does not become ripe until a property owner has exhausted the State's remedy for obtaining compensation, *see Williamson Cty. Reg. Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 194-97 (1985), a claim for compensation in the state courts is necessarily governed by state law. A state court can impose limitations on the availability of judicial review beyond those which apply in the federal courts so long as those requirements do not violate the Due Process Clause of the Fourteenth Amendment. No such showing can be made here. [2]

A. Because A Fifth Amendment Takings Claim Is Not Ripe Until A Property Owner Has Utilized State Procedures For Obtaining Compensation And Been Denied Relief, A Regulatory Takings Claim Is Governed By State Law And State Ripeness Rules

Petitioner asserts that " 'the demand for finality is satisfied' " with respect to his claim because there is " 'no question here about how the "regulations at issue [apply] to the particular land in question. " ' " Pet. Br. 14 (citations omitted). Petitioner therefore rejects the Rhode Island Supreme Court's " 'additional applications' requirement [as] inconsistent with" this Court's ripeness doctrine. *Id.* at 16. In petitioner's view, state courts can go no further than the limitations which this Court has created as a matter of federal ripeness doctrine. Petitioner thus asks this Court to take the unprecedented step of imposing a federal rule governing the justiciability of a regulatory takings claim heard in the state courts.

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[2] For purposes of the arguments made at pp. 5-23 herein, *amici* assume that petitioner owns the wetlands which are the subject of this dispute. The legal uncertainty as to whether petitioner owns the wetlands is itself a further reason for dismissing this case as not ripe. *See* pp. 23-25, *infra*.

Petitioner's contention reflects a fundamental misunderstanding of this Court's takings jurisprudence and the role of this Court in supervising the state courts' determination of their jurisdiction. The argument is illogical, ignores a critical feature of Rhode Island law, and would unduly intrude on the State's sovereign authority to structure its administrative and judicial processes.

1. The first flaw in petitioner's argument is the erroneous premise that the Court's ripeness doctrine applicable in Fifth Amendment regulatory takings cases is binding on the state courts.

This Court has repeatedly explained that " 'ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.' " *Suitum v. Tahoe Reg. Planning Agency,* 520 U.S. 725, 733 n.7 (1997) (quoting *Reno v. Catholic Social Servs., Inc.,* 509 U.S. 43, 57 n.18 (1993)). The Court has further stated that "[t]here are two independent prudential hurdles to a regulatory takings claim brought against a state entity *in federal court.*" *Suitum,* 520 U.S. at 733-34 (emphasis added). The first of these requirements is that a property owner must have "received a '*final decision* regarding the application of the [challenged] regulations to the property at issue' *from 'the government entity charged with implementing the regulations.'* " *Id.* at 734 (quoting *Williamson County,* 473 U.S. at 186) (emphasis added).

The takings claims at issue in both *Suitum* and *Williamson County* were brought in federal district court. *See Suitum,* 520 U.S at 731-33; *Williamson County,* 473 U.S. at 182. This Court, of course, "has broad supervisory power over the lower federal

courts." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law* § 213, at 191 (3d ed. 1999); *see also Asarco Inc. v. Kadish,* 490 U.S. 605, 621 n.1 (1989) ("'supervisory power over the judgments of the lower federal courts . . . is a broad one'") (quoting *United States v. Munsingwear, Inc.,* 340 U.S. 36, 40 (1950)). It does not, however, possess "supervisory powers over state courts." Rotunda & Nowak, § 213, at 191. *Cf. Asarco,* 490 U.S. at 620 ("to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law . . . would be contrary to established traditions and to our prior decisions recognizing that the State courts are not bound by Article III"); *Garvin v. Cochran*, 371 U.S. 27 (1962) (this Court does not dictate to state courts the mootness principles to be applied under state law). The prudential limitations on the exercise of federal court jurisdiction over federal takings claims thus do not restrict a state court's authority to impose limits on its own jurisdiction.[3]

The text of the Fifth Amendment further refutes petitioner's attempt to federalize the law of ripeness to prohibit the Rhode Island courts from imposing their own ripeness rules. As this Court has explained, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. *See also Hodel v. Virginia Surface Mining &*

[3] *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), does not support federalizing the law of ripeness in the state courts. While *MacDonald* came to the Court from the California state courts, the Court analyzed the case under federal ripeness principles solely to assess its own jurisdiction. *See* 477 U.S. at 348.

Reclamation Assn., Inc., 452 U.S. 264, 297 n.40 (1981). Furthermore, the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking." *Williamson County*, 473 U.S. at 194. Rather, "all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* (internal quotations and citations omitted).

The Court has thus held that where "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County,* 473 U.S. at 195. *See also id.* at 194 n.13 ("because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied"); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999) ("had an adequate postdeprivation remedy been available," property owner "would have suffered no constitutional injury from the taking alone"); *Hurley v. Kincaid,* 285 U.S. 95, 104 (1932) ("the illegality . . . is confined to the failure to compensate [the owner] for the taking").

The consequence of these holdings is that a regulatory takings claim is not a takings claim at all for federal law purposes until the property owner has exhausted the State's remedies. *See, e.g., Williamson County*, 473 U.S. at 196 (observing that "[u]nder Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking" and that the state courts "allow recovery through inverse condemnation

where the 'taking' is effected by restrictive zoning laws or development regulations"); *Del Monte Dunes*, 526 U.S. at 710 (property owner's Section 1983 action "did not accrue until [owner] was denied just compensation"). Until that point, the claim is governed by state law. Petitioner's suggestion that federal law supplies a rule which preempts the Rhode Island Supreme Court from adopting its own ripeness rules is thus not only unprecedented, *see, e.g., Asarco*, 490 U.S. at 620 & n.1, but is also illogical.

Thus, although petitioner contends that the Rhode Island Supreme Court's additional applications requirement "cannot be squared with this Court's ripeness jurisprudence," Pet. Br. 14, there is no need for it to be. That the Rhode Island Supreme Court "did not cite any authority for" its additional applications requirement does not, as petitioner suggests, manifest that the court was flouting federal law. *Id.* Rather, it indicates that the Rhode Island court understood that this Court's ripeness jurisprudence is not binding on state courts and that it was creating a rule of state law. This conclusion is confirmed by the court's statement explaining that "[t]he doctrine of administrative finality dictates that an applicant may not challenge administrative action by filing identical repetitive applications, but must bring any challenge in Superior Court in accord with the [Rhode Island] Administrative Procedures Act." Pet. App. 12a n.6 (citing R.I. Gen. Laws § 42-35-15).[4]

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[4] A state court's dismissal on the ground that a non-federal claim is not ripe is an independent and adequate state law ground for the court's judgment. *Amici* acknowledge that when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). *Long*, however, does not apply here. While it suggests that this Court will review a state court decision absent a clear expression that the decision is based on an independent and adequate state ground, *see id.* at 1041, *Long* involved a decision on the merits. The *Long* reasoning does not apply when the question involves the justiciability of a case in the state courts. As explained above, federal law does not control whether petitioner's claim was ripe in the Rhode Island courts.

2. While the Rhode Island Supreme Court did not cite authority for its additional applications requirement, the Coastal Council's rules authorized the granting of a variance from the Council's standards. Coastal Resources Management Council, The State of Rhode Island Coastal Resources Management Program § 120, at 29 (as amended June 28, 1983). In contrast to the special exception provision emphasized by petitioner, which required a showing that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests," *id.* § 130.A(1), the variance provision authorized the Council to grant "[r]elief from a standard" based on a lesser showing. *Id.* § 120.B. The variance criteria specifically took into account whether "[d]ue to conditions at the site in question, the standard will cause the applicant an undue

hardship." *Id.* § 120.A(3). While an applicant was required also to meet other criteria,[5] the Council's granting of a variance would likely address the central concern of the Takings Clause—protection against a regulation that "'goes too far'" because it allows "'*no* productive or economically beneficial use of land.'" *Suitum*, 520 U.S. at 734 (quoting *Pennsylvania Coal. Co. v. Mahon*, 260 U.S. 393, 415 (1922), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19 (1992)).

Petitioner did not utilize the Coastal Council's variance procedure. *See* Resp. App. 35a. Perhaps this is explained by petitioner's view that it "simply *does not matter*" that the agency would approve "a less intensive plan" where an owner deems such a plan to be insufficient to "satisfy his reasonable investment-backed profit expectations." Pet. Br. 19. Indeed, petitioner goes so far as to assert that "the *ripeness* of a takings claim should not turn on the accuracy of the property owner's allegations about economic viability or profit expectation." *Id.* Presumably this is because "it might turn out"—after a trial—that a "property owner's allegations regarding economic viability and profit expectations are simply wrong." *Id.*

But as this case demonstrates, under petitioner's approach the ripeness of takings claims will be based

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[5] The other criteria are: whether "[t]he proposed alteration conforms with applicable goals and policies in Parts Two and Three" of the Council's regulations, whether "[t]he proposed alteration will . . . result in significant adverse environmental impacts or use conflicts[,]" whether "[t]he modification requested by the applicant is the minimum necessary to relieve an undue hardship[,]" and whether "[t]he undue hardship is . . . the result of any prior action of the applicant." Coastal Resources Management Program § 120.A(1), (2), (4), & (5).

on the highly subjective and wildly inflated profit expectations of a property owner. Here, for example, petitioner "sought damages in the amount of $ 3,150,000, based on the profits he claimed he would receive from . . . developing the property as seventy-four lots for single family homes." Pet. App. 5a. Petitioner brought this suit even though the town's "zoning law would not permit seventy-four lots to be developed on only eighteen acres," and that he would not "be able to obtain the necessary permits for the installation near [the pond] of the number of septic systems that his proposed development would require." *Id.* at 13a n.7.

Indeed, the Council did affirmatively establish these facts, although only after a lengthy and unnecessary trial with the concomitant expenditure of judicial resources. Furthermore, petitioner's approach would create an incentive to litigate rather than negotiate. Its likely consequence would be that property owners will submit grandiose plans, in effect daring the government to deny their application so as to precipitate a lawsuit. This is an especially inappropriate result given the complexity of land use regulation and the give-and-take of the administrative process. *Cf. MacDonald,* 477 U.S. at 350 ("The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."). And under petitioner's rule, every agency denial of a permit application could give rise to a lawsuit.

It is entirely appropriate for the Rhode Island Supreme Court to fashion the State's ripeness rules to protect the integrity of the state administrative scheme applicable to petitioner's property. Indeed,

while the state supreme court recognized that petitioner had not shown at trial that he "would be able to obtain the necessary permits for the installation near Winnapaug Pond of the number of septic systems that his proposed development would require," Pet. App. 13a n.7, the court could have validly insisted on compliance with the Coastal Council's rules as a condition precedent to his inverse condemnation claim. Of note, a Coastal Council rule expressly declares as "[p]rerequisites" that "[a]pplicants for residential structures shall obtain, as necessary, a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued," and that "[a]pplicants proposing to build an individual sewage disposal system (ISDS) shall obtain a permit from the Department of Environmental Management." Coastal Resources Management Program, § 300.3.B.1 & .2.[6] *See also*

[6] The Council's rules state that "[a]ll persons applying for a Category B Assent . . . are required to . . . demonstrate that all applicable local zoning ordinances, building codes, flood hazard standards, and all safety codes, fire codes, and environmental requirements have [been] or will be met." Coastal Resources Management Program, § 300.1.(2). Applicants are also required to "demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity. . . ." *Id.* § 300.1.8. The Council's prerequisites are "[a]dditional requirements . . . for specific Category B activities." *Id.* § 300.1.

Furthermore, both of petitioner's applications were subject to the following prerequisites: "[a] water quality certification from the Department of Environmental Management," and a Clean Water Act fill permit from the U.S. Army Corps of Engineers. Coastal Resources Management Program, § 300.10.C.1 & .2. Petitioner's failure to comply with the Council's permit requirements is especially significant in light of the trial court's

id. §300.6.C ("Applicants for Council Assents to construct . . . individual sewage disposal systems or point source discharges shall first obtain a permit from the Department of Environmental Management. . . . The Council shall formally review proposed actions only after all other applicable state/local requirements have been met."); Resp. App. 22a (Coastal Resources Management Council Management Procedure 4.2 [4] ("municipal and state approvals shall be construed as a prerequisite for any application before the Council considers the application")).

Petitioner failed to comply with these rules when he submitted his 1983 application. Indeed, "during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land." Pet. App. 11a. Petitioner's contention that his suit is ripe notwithstanding his failure to comply with the Council's rules is simply an attempt to short-circuit the review process and shift the burden of proof as to compliance from himself to the State.[7] The Rhode Island Supreme Court was fully within its

finding that the filling of the wetlands "would constitute a public nuisance." Pet. App. 11b.

[7] In his reply to the State's brief in opposition, petitioner brushes aside the Coastal Council's rules. In response to the State's contention that he was required to obtain septic permit approval from the R.I. Department of Environmental Management before seeking a fill permit, petitioner replies: "Not only is this suggestion completely unsupported by any legal authority whatsoever, it is ludicrous on its face." Reply to Opposition to Petition for Writ of Certiorari at 6 n.3. Petitioner's assertion is flatly contradicted by the Council's rules. Moreover, the septic permit was just one of several prerequisites applicable to petitioner's applications. *See* Resp. App. 33a (testimony of CRMC Director Grover John Fugate).

authority to protect the Council from this blatant attempt to undermine the State's review processes. The court's dismissal on ground of lack of ripeness is therefore an independent and adequate state ground which supports the judgment below.

II. PETITIONER'S CLAIM IS NOT RIPE UNDER FEDERAL RIPENESS PRINCIPLES

When reviewed under federal ripeness principles, petitioner's takings claim is not ripe. Petitioner has not received a "final decision regarding the application of the regulations to the property" because he did not seek relief from the Coastal Council's standards under the variance provision set forth in the Coastal Resources Management Program § 120.A. *See Williamson County*, 473 U.S. at 186. Moreover, petitioner's failure to comply with the Council's rules compels this Court to engage in speculation regarding the property's suitability for development. Indeed, because petitioner's claim "rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all,"'" a decision other than dismissal of the case as unripe would necessarily constitute an advisory opinion in violation of Article III. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1995) (quoting 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532, at 112 (1984))).

1. The Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at

issue." *Williamson County*, 473 U.S. at 186. *See also Suitum*, 520 U.S. at 734; *MacDonald*, 477 U.S. at 351; *Hodel*, 452 U.S. at 297; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 137-38 (1978). This rule "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum*, 520 U.S. at 734 (quoting *Pennsylvania Coal*, 260 U.S. at 415). As the Court recently reiterated, "A court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes." *Id.* at 734 (internal quotations and citation omitted).

At least since *Hodel*, the Court has held that the final decision requirement mandates that a property owner exhaust available administrative remedies as a prerequisite to bringing a takings claim. Thus the *Hodel* Court, in rejecting a takings challenge to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.*, explained that:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement. . . or a waiver from the surface mining restrictions. . . . If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue . . . simply is not ripe for judicial resolution.

452 U.S. at 297 (citations and footnotes omitted).

Similarly, in *Williamson County* the Court held that although the property owner had submitted a development plan that had been rejected by the county, its failure to seek variances rendered its takings claim premature. *See* 473 U.S. at 187-91. The Court specifically observed that "in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted." *Id.* at 190.

The *Williamson* Court explained that this rule "is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Id.* The Court "consistently has indicated that among the factors of particular significance in the inquiry" as to whether a taking has occurred "are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191. These factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.*

Turning to the jury's verdict that the county had denied the owner "economically viable use of its property," *id.* at 182, the Court explained that it "indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections." *Id.* at 191. Because it was not clear whether the owner would have "been denied all

reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance," the Court concluded that "until the Commission determines that no variances will be granted, it is impossible for the jury to find . . . whether respondent will be unable to derive economic benefit from the land." *Id.* at 191 (internal quotation omitted). Or, as the Court succinctly put it in *MacDonald,* "no answer [to the takings inquiry] is possible until a court knows what use, if any, may be made of the affected property." 477 U.S. at 350.

The posture of this case is similar to that of *Williamson County*. While petitioner has submitted two applications to the Council to fill the wetlands on his property, only his beach club application proposed any specific development. *See* Pet. App. 11a. And while petitioner sought a special exception for both applications, he has never utilized the Council's variance provision. *See* Resp. App. 35a. As the Rhode Island Supreme Court explained, "Palazzolo has not sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." *Id.*

Indeed, while this dispute centers on "approximately eighteen acres of wetlands," the precise size of the property—which clearly includes several uplands areas—is unknown. Pet. App. 3a; *see also* Joint Lodging No. 2, Defendant's Exhibit AA (plat map). Notwithstanding petitioner's various assertions to the contrary, the scope of permissible development on these upland areas has never been conclusively determined by the Council. The Rhode Island Supreme Court's statement that "it would be possible to build *at least* one single-family home on

the existing upland area, with no need for additional fill," Pet. App. 11a (emphasis added), an apparent reference to the area "at the eastern end of Shore Gardens Road," *id.* at 5b, does not establish whether additional development could occur in the upland area located at the southern end of the property, some of which may constitute developed barrier beach which can be filled. *See* Joint Lodging No.2, Defendant's Exhibit AA; *see also* Coastal Resources Management Program at 24; Resp. App. 37a, 42a-44a. Petitioner makes much of his testimony that "'CRMC informed him that *any* proposal involving the filling of wetlands would be denied.'"[8] Pet. Br. 12 (quoting Pet. App. 5b (trial court decision)). Absent the Council's conclusive determination as to the scope of permissible development on these upland areas, a court cannot determine whether petitioner has been denied all economically viable use of the property. *See Williamson County*, 473 U.S. at 191.

In sum, the courts still do not know "what use, if any, may be made of the affected property." *McDonald*, 477 U.S. at 350. And having failed to use the Coastal Council's variance provision, petitioner is precluded from objecting to the Rhode Island Supreme Court's "additional applications" requirement.[9]

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[8] The basis for this finding appears to have been petitioner's testimony regarding discussions he had with CRMC staff members. *See* Trial Transcript at 120. Such hearsay does not establish what the Council would have done in response to a specific variance request.

[9] The ripeness principles applicable in the federal courts to Fifth Amendment takings claims support the adoption of an "additional applications" rule. As *MacDonald* explains, "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable views." 477 U.S. at 353 n.9. Rejection of a single development proposal does not answer the question of "what use, if any, may be made of the affected property." *Id.* at 350.

2. Petitioner's takings claim is not ripe for another reason. Petitioner has never obtained the prerequisite permits required under the Coastal Council's rules for either his 74-lot subdivision proposal (which was never disclosed to the Council) or his beach club applications. *See supra* at 14-15. Having failed to obtain these permits, which are garden variety regulatory requirements that advance the State's health and safety concerns as to water quality, sewage disposal, flood hazard standards, and building code and zoning compliance,[10] his claim compels the Court to speculate whether the property is suitable for development at all.

This Court has held that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (internal quotations and citations omitted). Petitioner sought damages for the alleged taking of his property "based on its development potential" as a 74-lot subdivision. Pet. Br. 8. But the Rhode Island Supreme Court specifically observed that "the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres" and that

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[10] *Cf.* Daniel R. Mandelker, *Land Use Law* § 9.02, at 388 (4th ed. 1997) ("modern subdivision control statutes . . . prohibit subdivisions in floodplains and environmentally sensitive areas"); *id.* at 389 ("Many states also have public health programs that affect subdivision development. They authorize state health and environmental agencies to regulate on-site wells and on-site sewage disposal through septic tanks and similar facilities.").

"there was no evidence that Palazzolo would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require." Pet. App. 13a.

Petitioner's claim thus requires the courts to pile assumption upon assumption and engage in pure speculation as to the property's suitability for development. The first assumption a court must make is that petitioner could obtain a variance from other governmental authorities allowing a 74-lot development on slightly more than eighteen acres located in a flood hazard zone. *See id.* The second assumption is that the State would grant ISDS permits and the number thereof. *See id.* The third assumption is that the State would grant a water quality certification, an unlikely result in light of the trial court's express finding—which was not overturned on appeal—that petitioner's "proposal would constitute a public nuisance." Pet. App. 11b. The fourth assumption is that the Army Corps of Engineers would grant a Clean Water Act Section 404 fill permit. *See* 33 U.S.C. § 1344(a); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

In short, petitioner's claim "rests upon" so many "contingent future events," *Texas v. United States*, 523 U.S. at 300 (internal quotations and citations omitted), that no court can fairly determine the scope of permissible development. This is, however, essential for determining not only "the economic impact of the [Coastal Council's] action" but also "the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191. A court thus cannot

determine whether a taking has occurred or the property's fair market value. *See* Resp. App. 46a (testimony of Thomas S. Andolfo). Moreover, until such time as petitioner complies with the administrative process and establishes a level of development that would not constitute a nuisance, ruling on the other questions presented would be an advisory opinion in violation of Article III.

3. A final reason why the Court should dismiss petitioner's claim as unripe is that there is substantial uncertainty as to whether petitioner owns the wetlands that the State allegedly has "taken." The Court cannot address the question of whether the State has denied petitioner economically viable use of his property if it does not know how much property he owns.

This Court has long recognized that "the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States, belong to the respective States within which they are found. . . ." *Shively v. Bowlby*, 152 U.S. 1, 47 (1894). *See also Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (state holds title to submerged lands under public trust). While "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy," *Shively*, 152 U.S. at 26, "Rhode Island decisional law and [the Rhode Island Supreme Court] have never cast aside the public-trust doctrine." *Greater Providence Chamber of Comm. v. Rhode Island*, 657 A.2d 1038, 1042 (R.I. 1995); *Hall v. Nascimento*, 594 A.2d 874, 877 (R.I. 1991) ("It is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the

high-water mark, and it holds such land in trust for the use of the public.").

In describing the property, the Rhode Island Supreme Court noted that "[s]ome of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and 'ponding' in small pools occurs throughout the wetlands." Pet. App. 3a. Moreover, the 1980 assessor's plat indicates that the mean high-water mark is at an elevation of 1.72 feet.[11] *See* Joint Lodging No. 2, Defendant's Exhibit AA. The elevations recorded on the plat suggest that a substantial amount—if not most—of the property is below the mean high-water mark and thus belongs to the State rather than to petitioner.[12]

Because petitioner may not even own much of the land to which he claims title, his takings claim may be nothing more than a groundless claim for compensation cast in the guise of a disagreement over the Coastal Council's "prohibition against filling coastal wetlands." Pet. Br. 12. If petitioner does not own the wetlands because they are below the mean high-water mark, the State did not commit a taking

[11] Consistent with this Court's decision in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 27 (1935), the Rhode Island Supreme Court has held that the mean high-water mark sets the landward boundary of the State's tidelands. *State v. Ibbison*, 448 A.2d 728, 731-32 (1982).

[12] The State raised this issue both at trial, *see* Defendant's Pre-Trial Memorandum 14-16, No. 88-0297 (R.I. Super. Ct. 1997), and on appeal. *See* Brief of Appellees 33-34, No. 98-333A (R.I. 2000). Neither court decided the issue.

when it prohibited him from filling them.[13] And even if some of the wetlands at issue are above the mean high-water mark, the Court cannot answer the question of whether petitioner has been denied economically viable use of property because the record does not reflect how much property he owns. Thus, until further fact-finding by the Rhode Island courts determines what portion of the wetlands belongs to petitioner, petitioner's takings claim is not ripe for adjudication by this Court.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

[13] While the Rhode Island Supreme Court has held that a littoral owner who fills "with the acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval" can establish title, the owner must not have "created any interference with the public-trust rights of fishery, commerce, and navigation." *Greater Providence Chamber*, 657 A.2d at 1044. "The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission." *Id.* Moreover, a littoral owner cannot obtain title against the State through adverse possession. *Id.* at n.2.

Respectfully submitted,

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